

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MAYNOR BROCK III
Claimant

VS.

WEAVERS A-OK EXTERMINATORS
Respondent

AND

COMMERCE & INDUSTRY INS. CO.
Insurance Carrier

Docket No. 1,016,295

ORDER

Respondent requests review of the November 29, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

ISSUES

This appeal stems from an Order in which the ALJ granted claimant's motion for penalties under K.S.A. 44-512a for respondent's failure to pay weekly compensation benefits in a timely fashion. In the same Order, the ALJ denied claimant's request for attorneys' fees. The ALJ concluded respondent's conduct in connection with the underlying preliminary hearing Order granting weekly compensation benefits and the subsequent appeal of that Order was not a violation of the standards set forth in K.S.A. 44-536a. Thus, he was not authorized to grant claimant's request for attorneys' fees.

Respondent contends the ALJ erred in awarding claimant \$800 in penalties for the delay in paying the weekly compensation benefits encompassed by the ALJ's preliminary hearing Order of July 1, 2004. Respondent first argues the claimant's demand letter was premature and thus, no penalties can be properly awarded. Secondly, respondent asserts that claimant's demand letter lacked sufficient particularity as required by K.S.A. 44-512a. Absent specificity, respondent maintains the claimant's demand was defective and cannot

form the basis for any award of penalties. Therefore, respondent requests the ALJ's award of penalties be set aside and vacated.

The Board notes that this second argument, the lack of specificity, was not made to the ALJ at the preliminary hearing and as such, it will not be considered for purposes of this appeal.

Claimant argues that the ALJ correctly awarded penalties against respondent as the monies respondent failed to pay were due as of July 2, 2004, the day after the Order was issued and, by statute, were not stayed by any subsequent appeal. Moreover, claimant believes its demand was not only timely but sufficiently specific, in that it incorporated the ALJ's July 1, 2004 Order. Thus, claimant believes the \$800 penalty was appropriate, albeit inadequate. Claimant even goes so far as to suggest that the Board should consider imposing an increased penalty dating back to the date claimant was eligible for weekly benefits, that being March 31, 2004. If that were done, claimant suggests a penalty of \$2,143 is appropriate.¹

Claimant further argues that the ALJ's decision to deny attorneys' fees should be reviewed. Claimant contends that as of July 1, 2004, the weekly benefits awarded by the ALJ were due and owing, and that respondent's decision to appeal that preliminary hearing Order was made with full knowledge that it had no jurisdictional basis upon which to appeal. Accordingly, claimant maintains the decision to appeal was "to harass and to cause unnecessary delay and to increase the litigation costs in this matter."² Thus, claimant asks the Board to not only assess attorneys' fees for the work done in connection with the underlying preliminary hearing Order, but the time associated with claimant's subsequent Motion for Penalties as well as the time incurred in association with this appeal.

The issues to be resolved are as follows:

1. Whether claimant's statutory demand on July 12, 2004 was premature;
2. If the demand was not premature, whether and to what extent a penalty should be assessed; and
3. Whether attorneys' fees should have been awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

¹ Claimant's Brief at 5 (filed Jan. 18, 2005).

² *Id.* at 8.

In order to fully understand the pending issue, a chronology is required:

March 31, 2004	Claimant is given restrictions for one-arm work.
July 1, 2004	Following a preliminary hearing, the ALJ issued an Order granting claimant's request for temporary total disability (TTD) benefits at the rate of \$440 per week commencing 3/31/04 until claimant is released. ³
July 9, 2004	Claimant mails a statutory demand for payment of "any and all benefits ordered paid" to claimant. ⁴
July 12, 2004	Demand for payment of all monies ordered paid by the ALJ is served upon respondent's counsel.
July 14, 2004	Respondent appeals the July 1, 2004 preliminary hearing Order.
August 4, 2004	Claimant filed an Application for Penalties.
August 20, 2004	Board issues Order dismissing appeal finding there is no jurisdiction and rejecting the claim for attorneys' fees as that matter was not presented to the ALJ.
August 27, 2004	Weekly benefits are paid to claimant.
November 22, 2004	Application for Penalties and attorneys' fees is heard by ALJ.
November 27, 2004	Order granting \$800 in penalties and denying claimant's request for attorneys' fees is entered.

³ ALJ Order (July 1, 2004). The entire paragraph reads as follows: "The respondent and insurance carrier shall pay the claimant temporary total disability benefits from March 31, 2004 at the rate of \$440 per week until the claimant is released to work without restrictions, released to work with restriction that will permit substantial gainful employment, or reaches maximum medical improvement."

⁴ Motion for Penalties Hearing Trans., Ex. 1.

In granting the request for \$800 in penalties, the ALJ distinguished benefits ordered paid by virtue of a preliminary hearing Order and an Award. He reasoned that because preliminary hearing benefits are not stayed pending appeal⁵, the TTD benefits ordered here were due the day the preliminary award became effective, July 2, 2004. Thus, the ALJ found the claimant's demand, served on July 12, 2004, was not premature. And when payment was not made within the statutory 20 day period, respondent and its carrier were subject to a penalty, regardless of the respondent's subsequent appeal. The Board agrees with this analysis.

K.S.A. 44-534a(a)(2) provides in pertinent part:

If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award.

The word "from" as contained in the phrase "from the date of the preliminary hearing award" is a preposition which is used to indicate a particular time or place as a starting point.⁶ It is the Board's finding that the starting point in the subject sentence is the date of the preliminary hearing order as plainly stated. Accordingly, the Board concludes that because benefits awarded in a preliminary hearing order are not stayed from the date of the preliminary hearing order when appealed then, by implication, only benefits awarded prior to the date of the preliminary hearing order are stayed during the pendency of such appeal.

This means that as of July 1, 2004, those weekly benefits ordered by the ALJ that predated the date of the preliminary hearing, from March 31 up to July 1, 2004, were stayed and therefore not considered due. The balance of the benefits that were ordered, from July 1, 2004 and ongoing until claimant achieved one of the benchmarks listed in the Order were considered due, as of July 2, 2004, the day following the Order's issuance. It follows then that that portion of the Order was properly the subject of a demand for payment under K.S.A. 44-512a.

Nonetheless, the ALJ's decision was subject to appeal. K.S.A. 1999 Supp. 44-551(b)(1) states:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

⁵ K.S.A. 44-534a.

⁶ Webster's II New College Dictionary (1995).

K.S.A. 1999 Supp. 44-551 does not differentiate between the species of orders entered by the ALJ. Therefore, the Board does not differentiate between a preliminary hearing and an award for purposes of review. The same 10-day appeal time applies to each. However, in spite of respondent's contention to the contrary, the effect of an appeal on the benefits ordered paid is statutorily different depending on whether the judicial action being appealed is an award or a preliminary hearing.

K.S.A. 44-512a (Furse 1993) provides as follows:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid *when due* to the person, firm, or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . . (emphasis added)

A statutory demand under K.S.A. 44-512a (Furse 1993) can only be effective for compensation awarded claimant and then due and unpaid.⁷ Here, only a portion of the ALJ's Order represented benefits that were "due" under K.S.A. 44-534a(a)(2), specifically just those benefits that were ordered paid as of July 1, 2004 and continuing thereafter. The claimant issued a demand for those benefits on July 12, 2004. Even though this demand came before the appeal time expired, which would normally render it premature, in this instance it was not as the benefits reflected in this portion of the ALJ's Order were statutorily due and not stayed by any appeal. That Order could obviously be the focus of an appeal and later overturned. But the legislature determined that at least as to those benefits ordered paid *from the date of the preliminary award* they would be paid regardless of any appeal. To hold otherwise would require the Board to ignore the plain language contained in K.S.A. 44-534a(a)(2). Accordingly, the Board affirms the ALJ's assessment of \$800 in penalties as that is consistent with the 8 week period from July 2, 2004 to August 27, 2004.

The same reasoning renders moot claimant's argument that penalties should accrue from March 31, 2004, the date weekly benefits were ordered to commence. The benefits awarded before the date of the preliminary award are not considered "due" and therefore claimant's demand for them was premature.

In his Order the ALJ concluded that respondent's appeal "conformed to the law of K.S.A. 44-551 by alleging the judge exceeded his jurisdiction, and the responded grounded

⁷ *Hallmark v. Dalton Construction Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

that allegation in the facts of the case.”⁸ He further found that there was no evidence that respondent harbored any improper purpose by filing its appeal. Thus, no attorneys fees were awarded under K.S.A. 44-536a.

Although claimant’s counsel quite clearly takes issue with this finding, the Board agrees with the ALJ’s analysis and conclusions and affirms the his denial of claimant’s request for attorneys’ fees.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated November 29, 2004, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁸ ALJ Order (July 1, 2004) at 2.